

Decision 06-05-042 May 25, 2006

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338 E) for Approval of Economic Development Rates.

A.04-04-008  
(Filed on April 5, 2004)

Application of Pacific Gas and Electric Company to Modify the Experimental Economic Development Rate (Schedule ED). (U 39 E)

A.04-06-018  
(Filed on June 14, 2004)

**ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 05-09-018  
REGARDING THE FLOOR PRICE, MODIFYING THE DECISION, AND  
DENYING REHEARING AS MODIFIED, IN ALL OTHER ASPECTS**

**I. INTRODUCTION**

In this Order we dispose of the application for rehearing of Decision (D.) 05-09-018 (“Decision”) filed by Aglet Consumer Alliance (“Aglet”).

In Application (A.) 04-04-008 Southern California Edison Company (“SCE”) requested approval of its proposed economic development rate (“EDR”) tariffs. In A.04-06-018 Pacific Gas and Electric Company (“PG&E”) requested approval of its proposed EDR tariffs. On August 30, 2004, the Commission consolidated these two applications and the utilities subsequently submitted a joint EDR proposal (“Joint Proposal”). In D.05-09-018 we approved the Joint Proposal, with modification, for uniform EDR discount tariffs for the SCE and PG&E.

On October 11, 2005, Aglet Consumer Alliance (“Aglet”) timely filed an application for rehearing challenging the Decision on the grounds that: (1) the Decision’s

characterization of past experience with free-riders is not supported by the evidence; (2) the Commission's characterization of California Business Investment Services ("CalBIS") is exaggerated and constitutes factual error; (3) the Decision violates Rule 77.3 by modifying the floor price to be used for calculating EDR discounts based on evidence outside the record; and (4) the Commission excludes California Department of Water Resources ("DWR") bond charges from the floor price contrary to the legislative intent of Public Utilities Code Section 366.2(d)(1).<sup>1</sup> Responses to Aglet's application for rehearing were filed by SCE and PG&E.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that Aglet's challenge to our modification of the utilities' Joint Proposal floor price has merit. Therefore, as discussed in Section C of this Order, we grant limited rehearing to consider whether the floor price under the utilities' Joint Proposal results in any inequity in EDR discount amounts as between direct access and bundled customers, and the means to address this inequity. In addition, we modify the Decision to eliminate certain dicta relating to CalBIS and to correct inaccurate references to the Business, Transportation and Housing Agency. As to all other issues, we do not believe good cause exists to grant rehearing and rehearing of D.05-09-018 is denied. EDR charges under D.05-09-018 shall continue, subject to adjustment, pending conclusion of the limited rehearing.

## **II. DISCUSSION**

### **A. Characterization of Past Experience With Free-Riders**

Aglet contends that the Decision errs by stating: "[p]ast experience dictates that although the EDR system will inherently attract a small number of free-riders, these aberrations will be insufficient to offset the widespread ratepayer benefits that the incentives will entail." Aglet argues that the evidence does not support a conclusion that

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<sup>1</sup> All other Section references are to the Public Utilities Code, unless otherwise stated.

only a small number of free-riders will result, and contends that the characterization of past experience as an aberration is factually wrong. (Aglet Rhg. App., pp. 1-2.)

The Decision does not find that EDR discounts will attract no free-riders, only that free-ridership is not the norm.<sup>2</sup> Aglet is wrong that evidence does not support our conclusion that the limited number of free-riders will not outweigh ratepayer benefits. Our conclusion is supported by Exhibits 30 and 31.

Aglet argues the evidence supports the contrary result. Citing to the same exhibits, Aglet argues that EDR discounts will attract free-riders, suggesting that it will occur to a degree which will outweigh program benefits.<sup>3</sup> Aglet disputes how we weighed the evidence, and drew from it a different conclusion. However, this does not constitute legal error. Relying on Exhibits 30 and 31, we could reasonably conclude the program would attract only a small number of free-riders which would be insufficient to offset overall ratepayer benefits.

We note that the conclusions proffered as a result of this evidence varied. For example, the Office of Ratepayer Advocates<sup>4</sup> made no specific allegations regarding the number of free-riders that EDR discounts might attract, but instead simply advocated for adequate safeguards. (ORA Opening Brief, p. 6.) PG&E and SCE both argued that Aglet misinterpreted the past experience data. (SCE Opening Brief, pp. 8-12, SCE Reply Brief, pp. 1-13, PG&E Opening Brief, pp. 14-15, PG&E Reply Brief, pp. 18-19.) PG&E further argued that in 15 years of experience with the ED rate, no claim has ever been made regarding free-ridership. (PG&E Opening Brief, p 14, Exh. 9, PG&E Rebuttal Testimony, pp. 3-9 to 3-10.) Even Aglet stated that “[i]t is unreasonable to assume perfect enforcement of EDR eligibility conditions and no free-ridership.” (Aglet Opening

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<sup>2</sup> Aberration is defined as a deviation from what is typical or normal. (See Webster's New World Dictionary, Third College Edition.)

<sup>3</sup> Aglet does not propose any particular estimate of how many free-riders might be expected to result based on its evaluation of the evidence.

<sup>4</sup> Subsequent to this proceeding Senate Bill 608 (Stats. 2005, ch. 440, § 1.) took effect renaming ORA as the Division of Ratepayer Advocates.

Brief, p. 11.) And while arguing that under “some circumstances” a small number of free-riders could reverse the utility analyses, Aglet did not identify the circumstances that would cause such a result. What was offered in the record was not persuasive.

Nothing in the record indicates that any party offered a definitive numerical estimate of how much free-ridership could be expected based on past experience with the EDR discount. We evaluated the evidence and agreed with the utilities that the overall free-rider rate would need to be as high as 75% in order to detract from ratepayer benefits. Further, the Decision reasons that past experience in combination with imposition of additional preventative measures, such as those adopted in our Decision, will ensure free-ridership remains at low levels. (D.05-09-018, pp. 14-15.)

While Aglet may disagree with the weighing of the evidence, such disagreement does not constitute legal error. The record contained evidence to support the Decision’s conclusions. Accordingly, Aglet’s argument on this issue has no merit and should be rejected.

**B. Characterization of California Business Investment Services (“CalBIS”)**

Aglet contends the Decision errs by stating: CalBIS is “the state’s preeminent evaluator of economic development issues.” Aglet maintains this is an exaggeration that constitutes factual error, and argues there is no evidence to show CalBIS has reached preeminence. (Aglet Rhg. App., p. 2.) Essentially, Aglet challenges dicta in the Decision.

In our Decision, we adopt a number of safeguards intended to protect against potential free-riders. One safeguard requires third party review of EDR discount applications. CalBIS was selected as the third party to perform the preliminary review of applicants, with the utility to make the final review and determination. CalBIS’ approval is deemed necessary but not sufficient for eligibility. (D.05-09-018, pp. 18-19, 24-25.)

We note that the selection of CalBIS is supported by the evidence. The record reflects that no party to the proceeding objected to the concept of a third party review safeguard. Only two concerns were raised with the selection of CalBIS. Aglet

argued that CalBIS' overall objective to attract and retain business is incompatible with an independent assessment function. (Aglet Opening Brief, pp. 11-12.) Modesto Irrigation District was concerned that CalBIS' assumption of new duties related to the functions of the former California Trade and Commerce Agency may leave it limited resources to take on the additional third party review function. (Exhibit 26, p. 11 (Christopher J. Mayer/Modesto Irrigation District).) However, no party contested the issue of whether CalBIS possesses the qualifications and knowledge to perform the requisite review. Further, no party suggested any another entity that would be more qualified to serve in the third party review role.

Aglet's objection to the characterization of CalBIS' status is a factual issue, and CalBIS' qualification is supported by the record. As discussed above, no one objected to the selection of CalBIS, and no evidence in the record contradicts our conclusion that CalBIS is qualified to act in the designated role. Accordingly, evidence in the record demonstrates CalBIS' qualification and selection.

However, the Decision's reference to CalBIS' "preeminence" is not necessary to support CalBIS' selection, and thus, we will eliminate the reference as set forth below in the ordering paragraphs.

Finally, Aglet correctly points out an agency designation error in the Decision. The Decision states that CalBIS acts under the supervision of The California Business, Transportation and Highway Agency ("BTH"), when in fact CalBIS is an arm of the Business, Transportation and Housing Agency. (Aglet Rhg. App., p. 2.) Aglet is correct and the Decision should be modified to reflect the proper name designation. Specific corrections in this regard will be made as set forth below in the ordering paragraphs.

**C. Reliance on Evidence in Violation of Rule 77.3 and  
Adopted Floor Price**

Aglet states that the Decision errs because it relies on evidence outside the record to modify the final floor price adopted for purposes of calculating the EDR

discount. Accordingly, Aglet contends the Decision violates Rule 77.3 of the Commission's Rules of Practice and Procedure ("Rule 77.3"). (Aglet Rhg. App., p. 3.) Rule 77.3 provides in pertinent part:

"New factual information, untested by cross-examination, shall not be included in comments and shall not be relied on as the basis for assertions made in post publication comments." (Code of Regs., tit. 20, § 77.3.)

Aglet's argument is based on a modification to the floor price which appears between the first Alternate Proposed Decision ("First Alternate") and the final Alternate Opinion which was ultimately adopted as the Decision. Aglet contends that the modification in the Decision was solely, and thus improperly, based on new information submitted by PG&E in comments on the First Alternate. As discussed below, upon further review of the record we believe Aglet's allegation has merit.

The First Alternate accepted the floor price reflected in the utilities' Joint Proposal (Exhibit 29), without modification. That floor price would limit the EDR discount to ensure revenue does not fall below a floor price which would be calculated to include the following specific nonbypassable charges: transmission charges; public purpose program ("PPP") charges; nuclear decommissioning ("ND") charges; DWR Bond Charges; [ongoing or tail] Competition Transition Charge ("CTC"); marginal costs for distribution; and, if bundled customer, marginal costs for generation.

The Decision modifies this floor price to exclude the nonbypassable charges, indicating that the exclusion was made in response to information submitted in PG&E's comments on the First Alternate. (D.05-09-018, pp. 22-23, citing to PG&E Initial Comments, p. 3, dated August 15, 2005.) That information consists of a concern attributed to an unidentified large industrial direct access customer, who allegedly stated that by including nonbypassable charges in the floor price, the customer would not have sufficient inducement to expand and refurbish its California facility.

Aglet objected to the information, stating that since it is not in the record, we should not have given it any weight in reaching our final determination. (Aglet Reply

Comments, p. 3, dated August 22, 2005.) SCE does not contest that the information is new, but suggests it is “substantially similar” to evidence in the record. (SCE Response to Application for Rehearing, p. 5, citing to Exh. 2, p. 3.)

Further review convinces us the evidence is not substantially similar. Instead, that evidence referenced by SCE relates to separate program issues regarding the cap on customer participation and the “but-for” test. It does not address the floor price or nonbypassable charges. Moreover, we take note that SCE’s own reply comments objected to the information in PG&E’s comment. SCE stated that the exclusion of nonbypassable charges was not part of the Joint Proposal and is unfair. SCE recommended that if we wanted to grant such an exclusion we should also adopt corresponding ratemaking mechanisms to ensure bundled service customers are not burdened by the discount afforded to direct access customers. (SCE Reply Comments, pp. 1-2, dated August 22, 2005.)

Similarly, we see that PG&E does not contest that the information it submitted in comments is new, stating instead that the option of excluding nonbypassable charges was part of its original application and was fully litigated in the proceeding. (PG&E Response to Application for Rehearing, pp. 3-4, citing to Exh. 9, pp. 3-10/Kataoka Rebuttal Testimony.) Again, our closer review here finds differently. The cited evidence is a witness statement which opposes any contention by other parties that DWR Bond Charges and other nonbypassable charges should not be excluded due to potential cost shifting. This witness statement also references Chapter 6 of Exh. 7/Kataoka Direct Testimony, for further discussion. That evidence in turn discusses separate program considerations regarding the overall cost-benefit of the proposal, free-riders, and shareholder funding. It does not address the floor price, excluding nonbypassable charges for EDR customers, or associated cost shifting and ratemaking considerations.

The record primarily consists of initial position statements concerning the exclusion of nonbypassable charges. For example, PG&E’s original application suggested excluding nonbypassable charges. (PG&E Opening Brief, p. 25.). SCE and the

intervenors stated that they did not support that exclusion. (SCE Opening Brief, p. 33, ORA Opening Brief, p. 14, Aglet Opening Brief, p. 18, Reply Comments of Merced Irrigation District, pp. 1-2.) However, both PG&E and SCE later acknowledged that once the Joint Proposal was submitted, any issue of whether to exclude those charges was removed, became moot, and was not litigated in the proceeding. (PG&E Opening Brief, pp. 25-26, SCE Reply Brief, pp. 32-33.)

In D.05-09-018 we modified the Joint Proposal to exclude nonbypassable charges from the floor price stating that the Joint Proposal unnecessarily favored bundled customers over direct access or even potential community choice aggregation customers by limiting the components of the bills to which the discount would be applicable. (D.05-09-018, p. 22.) Specifically, we believe an inequity would be created because while a generation proxy would be included in the calculation of the EDR discount for direct access customers, application of the discount would be limited by the floor price such that the discount could only be applied to distribution and transmission contribution above marginal cost. In contrast, for bundled customers the EDR discount could also be applied to the generation contribution above marginal cost. In an effort to ensure customer neutrality, our decision amended the floor price to exclude nonbypassable charges, such that the discount could be applied to those components.

Our review here leads us to conclude that in order to reach this result we require a more developed record on certain pertinent issues. Accordingly, we will grant limited rehearing for this purpose, as discussed below and set forth in the ordering paragraphs.

The limited rehearing shall examine the effect of applicable statutes<sup>5</sup> and related Commission policies to any desired exception from nonbypassable charges for EDR program customers. For example, some nonbypassable charges may be required without

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<sup>5</sup> Statutes to be considered shall include, but are not limited to Sections 366.2(d) (concerning DWR charges and cost shifting); 367 et seq. (concerning ongoing CTC charges); 379 (concerning Nuclear Decommissioning charges); and 381 et seq. (concerning Public Purpose Program charges).



exception, while others may be subject to exception upon a showing that there will be no cost shifting or otherwise at the discretion of the Commission. In addition, limited rehearing shall explore whether other mechanisms exist to provide the desired economic incentives, such as a removing the floor price altogether. In that instance EDR customers would continue to pay the nonbypassable charges, but the discount would be applied to all other available bill components, such as distribution and transmission. Limited rehearing would allow the Commission to determine if such an approach would result in a zero or negative margin, how to address any potential shortfall and identify offsetting customer benefits. Finally, the limited rehearing shall consider whether one or some combination of the two approaches would best meet EDR program goals.

An ALJ Ruling shall be issued defining the scope of this limited rehearing. While this proceeding involved only the EDR program proposals for PG&E and SCE, the results of this limited rehearing may impact parties participating in other proceedings involving direct access and Cost Responsibility Surcharge (“CRS”) issues. Thus, parties to R.02-01-011 should be served with a copy of the order granting the limited rehearing and the ALJ ruling. EDR charges under D.05-09-018 shall continue, subject to adjustment, pending conclusion of the limited rehearing.

The ALJ ruling shall include consideration of the following issues:

- 1) Is it necessary to exclude some or all nonbypassable charges from the floor price in order to provide the level of EDR discount adopted in D.05-09-018? Answers should provide supporting facts and explanation.
- 2) Can the Commission “discount” any nonbypassable charges? Which ones?
- 3) For each individual nonbypassable charge, address whether exemptions or exceptions for EDR customers are permissible under the applicable statutes and Commission decisions.
- 4) What nonbypassable charges are subject to exception upon a Commission finding that there will be no cost shifting?
  - a. Parties advocating exception from the payment of such nonbypassable charges must submit a showing to demonstrate why cost shifting would not

occur (e.g., does customer retention in fact produce benefits that would offset any shifting of costs to other customer classes?).

- b. Do any of the benefits of retaining EDR customers accrue to shareholders? If so, how should this be considered when determining cost-shifting?
- 5) Can EDR program levels under D.05-09-018 be achieved by applying the discount to bill components other than nonbypassable charges? Are there any statutory restrictions to applying the EDR discount to the other bill components?
- a. What would be the resulting allocation of program costs?
  - b. Would applying the discount to the other bill components (e.g., distribution and transmission) result in zero or negative margin to those charges? If so, by how much (expressed as a percentage)? How should this shortfall be allocated among the remaining customer classes?
  - c. What benefits accrue to remaining customers that offset any shortfalls?

#### **D. Department of Water Resources (“DWR”) Bond Charges**

Aglet contends that the Decision errs by excluding DWR Bond Charges from the floor price to be used in calculating the EDR discount. Aglet contends this exclusion not only differs from the utilities’ Joint Proposal, but would allow EDR customers to avoid their “fair share” of DWR electricity costs, contrary to the intention of the Legislature as reflected in Section 366.2(d)(1). (Aglet Rhg. App., p. 4.)

Our grant of limited rehearing shall address all nonbypassable charges, including DWR Bond Charges. Therefore, we shall consider Aglet’s contention in connection with this limited rehearing.

### **III. CONCLUSION**

As explained above, D.05-09-018 is modified to eliminate certain dicta relating to CalBIS and to correct inaccurate references to the Business, Transportation and Housing Agency. Limited rehearing is granted to address modifying the floor price under the Joint Proposal to exclude nonbypassable charges, and associated issues. As to all other issues raised by Aglet, good cause does not exist to grant rehearing. Rehearing of D.05-09-018 as to all other issues is denied.

**THEREFORE, IT IS ORDERED** that:

1. The text of D.05-09-018, pages 18-19 is modified to eliminate reference to CalBIS' "preeminent" status by amending the following sentence to read:

"Despite Merced ID's concerns, it is clear that CalBIS has the expertise and staff to identify and screen legitimate economic development candidates."

2. The text of D.05-09-018, page 19, referring to The California Business, Transportation and Highway Agency is modified to read:

"The California Business, Transportation and Housing Agency"

3. The table in D.05-09-018, p. 25, referring to The California Business, Transportation and Highway Agency is modified to read:

"The California Business, Transportation and Housing Agency"

4. Limited rehearing is granted to address the exclusion of nonbypassable charges from the utilities' Joint Proposal floor price as discussed herein, associated statutory and cost shifting issues, and whether other options exist for effectuating an EDR program pursuant to Public Utilities Code Section 740.4. An ALJ Ruling shall be issued asking parties for comment and proposals on questions to include those specified in Section C of this Order. Notice of this Order and the ALJ ruling shall be served on parties to this proceeding as well as parties to R.02-01-011.

5. EDR charges under D.05-09-018 shall continue, subject to adjustment pending conclusion of the limited rehearing.

6. This proceeding shall remain open to resolve the specified limited rehearing issues.

7. Rehearing as to all other issues is denied.

This order is effective today.

Dated \_May 26, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners